legislature, and it adopted the redistricting plan at issue here. In 2004, that party carried 58% of the vote in statewide races, and they captured 21 congressional seats (66%) compared to 11 for the Democrats (34%). *Id.* at 13a. Appellants brought this lawsuit challenging the plan.

The panel rejected appellants' claim that "redistricting for purely partisan purposes" is "arbitrary and capricious" and "lack[s] a rational basis." App. 14a, 15a. For one thing, "the self-interest of members of the legislative body will inevitably be a 'but-for' cause of voluntary redistricting," but invalidating a redistricting plan for that reason "would contradict the long-standing assumption by courts that a state may replace existing court-imposed redistricting plans with plans enacted by the state's legislature." *Id.* at 18a.

More importantly, the court emphasized that it is not necessarily irrational to redistrict "solely for partisan advantage"—particularly where doing so "dismantl[es] a prior partisan gerrymander that had entrenched a minority party, in order to allow a party with overwhelming statewide voting strength to capture two-thirds of [its] congressional delegation." *Id.* at 25a. The court also declined to apply heightened scrutiny to appellants' claim, noting that they were "unable to locate a substantive right or suspect criterion to trigger strict scrutiny." *Id.* at 16a.

The panel also rejected appellants' claim that the "one person, one vote" principle does not allow voluntary, mid-decade redistricting. App. 31a-39a. The "practical effect" of such a rule, the court observed, "would be to bar what courts have stated was within the prerogative of the state legislatures: to draw their own map to replace one imposed by a court." *Id.* at 35a. In addition, "[i]ndexing liability to voluntary redistricting could create large incentives to seek judicial invalidation of an existing plan as violative of equipopulous requirements." *Id.* at 38a. In sum, the court below was unwilling to "apply an established doctrine in a novel way, with uncertain basis and effect." *Id.* at 39a.

The panel's decision thus "followed the unbroken line of cases declining to strike down a redistricting plan as an illegal partisan gerrymander." *Id.* at 8a.

SUMMARY OF ARGUMENT

I. The text and history of Article I, § 4 of the United States Constitution demonstrate that federal courts should rarely, if ever, intervene in partisan redistricting decisions. That provision authorizes state legislatures to prescribe the time, place, and manner of congressional elections, but also provides that Congress may "make or alter" such regulations at will. Article I thus subjects state redistricting decisions to federal *legislative* review: Congress may "alter"—*i.e.*, *rewrite*—state redistricting laws.

This extraordinary power is far broader than Congress's other Article I powers. Ordinarily, Congress must rely on the Supremacy Clause to preempt state law, but Article I, § 4 allows Congress to regulate state law *directly*. Section 4 gives Congress a "blue pencil" power—a power to "alter," in its discretion, state laws affecting congressional elections. Given the intrusive nature of federal legislative review of state laws in this area, federal courts should be loath to impose an additional layer of judicial review absent a clear constitutional mandate.

History confirms that the Framers were well acquainted with partisan gerrymandering and, after much debate, dealt with it by crafting a *political* solution. Opponents of Article I, §4 maintained that congressional review of state election law would enable Congress to manipulate the electoral process, but proponents convincingly argued that Congress needed the authority to override state laws that threatened its ability to establish a quorum and conduct business. Thus, state law would initially determine the full range of election-related issues, including districting issues, but Congress would have a robust supervisory power to check abuses by

state legislatures that could threaten Congress's very survival.

Congress, moreover, has not been shy about exercising its broad authority under Article I, § 4. Since 1842, it has enacted numerous restrictions on state regulations in this area. Moreover, the wide range of laws that it has adopted shows that it stands ready to adjust its level of oversight to reflect prevailing views on what sorts of regulations are needed to ensure fair political representation. Congress's active implementation of Article I, § 4 thus confirms that there is little need for further oversight by the federal courts.

In large part because of Congress' activity in this area, this Court historically has recognized that it generally lacks institutional competence to intervene in redistricting matters. Legislative redistricting is a thoroughly political enterprise, involving a complex interplay of geographic, economic, social, and historical interests. Legislatures are not only better able to weigh and reconcile such interests, but they are more accountable to the people when they fail to do so. By contrast, federal courts lack both the institutional ability to engage in principled line-drawing in redistricting cases and the democratic accountability that justifies undertaking the mediation of such disputes. Thus, the federal judicial role is properly limited to enforcing clear constitutional norms, such as equal protection, and laws such as the Voting Rights Act.

II. The fact that one political party benefited more than another from a new redistricting plan does not give rise to any presumption that the plan is unconstitutional. To begin with, the Framers were well aware that redistricting would inevitably disadvantage *someone*. Moreover, invalidating a plan as "excessively partisan" would be especially short-sighted where, as here, it brings congressional representation closer in line with statewide party voting patterns. As shown in the Appendix, the majority of States adopted redistricting plans after the 2000 census that resulted in congressional representation reflecting statewide party voting patterns in

the most recent presidential or gubernatorial elections. And inasmuch as *Vieth* sustained a plan that *weakened* the link between state-wide party voting patterns and the parties' congressional seats, it is plainly constitutional for a State to adopt a plan that *strengthens* that relationship. Finally, given the facts that many States gain or lose congressional seats after each census and legislatures typically enact redistricting plans that benefit a majority of its members (see Appendix), recognizing appellants' partisan gerrymandering claims would invite unprecedented intrusion by federal courts into partisan politics.

III. The Constitution also does not forbid the States to engage in voluntary mid-decade redistricting based on the most recent decennial census data. This Court has long recognized that the decennial census, for all its imperfections, remains the benchmark for compliance with the "one person, one vote" principle. Nothing in the Constitution limits the States' right to redraw congressional districts when they see fit, provided they do so in a manner that comports with substantive constitutional norms. Of course, the fact that federal courts may not prohibit mid-decade redistricting does not mean that Congress or the States may not do so.

ARGUMENT

I. Text And History Confirm That The Constitution Permits The Federal Judiciary To Intervene In Redistricting Decisions Only In the Most Unusual and Egregious Circumstances.

The Constitution does not contemplate the searching judicial review of quintessentially political decisions that appellants demand in these cases. The plain text of Article I, § 4 reposes in state legislatures, and ultimately in Congress, the power to regulate congressional elections. The Framers well understood the problems of legislative apportionment, and they viewed them as political in nature. Their solution—expressed in Article I, § 4—was to give one *legislative* body a check on another *legislative* body, thereby ensuring that the

problems associated with apportionment ultimately could be monitored by the people themselves, at the polls. Congress has exceeded even the Framers' expectations in its exercise of this supervisory authority, and its historic willingness to regulate congressional elections demonstrates that judicial review of redistricting decisions is unnecessary in all but the most extraordinary circumstances.

A. By conferring on State legislatures responsibility for redistricting, subject to unusually broad oversight by Congress, the Framers signaled that federal courts would rarely intervene in redistricting.

1. Article I, § 4 of the Constitution, which sets out the lawful means of regulating congressional elections in our system of government, provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." The Constitution thus places in state legislatures the primary responsibility for regulating election to Congress. Such regulation, however, is subject to federal *legislative* review: Congress may "alter"—*rewrite*—virtually any state law regarding the manner of holding congressional elections, including redistricting laws. As the second Justice Harlan observed: "States have plenary power to select their allotted Representatives in accordance with any method of popular election they please, subject only to the supervisory power of Congress," which "is exclusive." *Wesberry* v. *Sanders*, 376 U.S. 1, 23 (1964) (dissenting opinion).

The breadth of congressional power under Article I, § 4 is nothing short of extraordinary, and it is wholly unique in our constitutional order. In areas within its enumerated powers, Congress must ordinarily rely on the Supremacy Clause to override state laws that it deems objectionable. Congress may expressly preempt state law, or it may do so impliedly—

by "preempting the field" or relying on the judiciary to hold "conflicting" state law preempted. See generally *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990). Congress may give States a choice between regulating in accordance with federal law and having their law preempted, see *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), or it may condition the States' receipt of federal funds on their adoption of federal regulatory standards, see *South Dakota* v. *Dole*, 483 U.S. 203 (1987). Moreover, where the Constitution authorizes Congress to enforce constitutional rights—such as the right of equal protection or the right to vote—it may directly regulate the conduct of state executive officials. See U.S. Const. amend. XIV, § 5; *id.* amend. XV, § 2; Voting Rights Act of 1965, 42 U.S.C. § 1973(b); 42 U.S.C. § 1983; *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Ex Parte Young*, 209 U.S. 123 (1908).

In none of these contexts, however, does the Constitution permit Congress to require the States to adopt or enforce specific laws, or to *rewrite* the States' laws. The judiciary on occasion exercises such powers of oversight, when striking down state laws that are unconstitutional or enjoining a State to adopt a particular legislative remedy to a problem. See *New York* v. *United States*, 505 U.S. 144, 179 (1992) (collecting cases). But "state legislatures are *not* subject to federal direction" from Congress. *Printz* v. *United States*, 521 U.S. 898, 912 (1997).

Indeed, this Court has emphatically held that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York*, 505 U.S. at 161 (citation omitted). As Justice O'Connor has explained, "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.* at 166. Thus, "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the

authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation." *Id.* at 178.

Enter Article I, § 4. That provision empowers Congress not only to "make" its *own* regulations governing the time, place, or manner of holding congressional elections, but also to "alter" *state* regulations on the subject. Article I, § 4 gives Congress a "blue pencil" power: it may rewrite or amend, to whatever extent deemed necessary and appropriate, state laws regulating congressional elections. In this area, and this area alone, the Framers were not content to let Congress rest on its power to preempt troubling state laws; they gave Congress the power to regulate state law *directly*—a power to amend state law that is tantamount to a power of legislative commandeering. The unique nature of Article I power over congressional elections thus reflects the unique importance of Congress's ability to maintain itself. See *Wesberry*, 376 U.S. at 42 (Harlan, J., dissenting) ("The constitutional scheme vests in the States plenary power to regulate the conduct of elections for Representatives, and, in order to protect the Federal Government, provides for congressional supervision of the States' exercise of their power").

The uniquely intrusive nature of federal *legislative* review of state laws regulating congressional elections is a powerful reason why the courts should not impose an additional layer of *judicial* review. Congress has nearly absolute authority to override state judgments in this arena; the only substantive limitation on Congress is that it may not regulate "the Places of chusing Senators." There is no "presumption against preemption" of state laws concerning elections to Congress, and Congress's review of state laws is effectively *de novo*.

It follows that, apart from circumstances in which the courts are enforcing some other constitutional norm (such as equal protection, see *Shaw* v. *Reno*, 509 U.S. 630 (1993)) or a provision of a federal law (such as the Voting Rights Act, 42

U.S.C. § 1971 *et seq.*), imposing judicial oversight on top of Congress's review would be an unwarranted interference with the ability of state legislatures to regulate congressional elections. As Justice Frankfurter once explained: "Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress." *Colegrove* v. *Green*, 328 U.S. 549, 554 (1946); accord *Wesberry*, 376 U.S. at 33 (Harlan, J., dissenting).

2. Due in large part to its unparalleled breadth, Article I, § 4 sparked intense debate at the Constitutional Convention and in the States. At the Convention, the proposal that Congress should have supervisory power to "make or alter" regulations for congressional elections met with immediate opposition. South Carolina delegates Charles Cotesworth Pinckney and John Rutledge moved that this provision be deleted from the draft Constitution because the States "could [and] must be relied on in such cases." 2 Max Farrand, *Records of the Federal Convention of 1787*, at 240 (1966).

James Madison responded by noting the probability that "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." *Id.* at 241. In other words, the process of regulating elections *necessarily* involved political calculation and was prone to mischief. The answer, Madison argued, was to give Congress—a *political* body answerable directly to the people—a check against abuses by the state legislatures. According to Madison, "the Legislatures of the States ought not to have the *uncontrouled* right of regulating the times places [and] manner of holding elections." *Id.* at 240 (emphasis added).

Although Article I, § 4 gave Congress broad supervisory authority, Madison presumed that the States would continue to determine (in the first instance) the full range of election-related issues: "[w]hether the electors should vote by ballot or viva voce, should assemble at this place or that place,

should be divided into districts or all meet at one place, *[should] all vote for all the representatives; or all in a district vote for a number allotted to the district.*" *Ibid.* (emphasis added). Except in extraordinary circumstances, the States would regulate congressional districting.

Madison prevailed, and the Convention agreed to retain the supervisory-authority provision in Article I, § 4. See 2 Farrand, *supra*, at 241. Proponents of the Constitution in the States frequently argued that the very existence of Congress depended upon its ability to regulate the elections of its members, since a combination of States might decline—as Rhode Island had earlier declined—to send representatives to Congress and thus deprive that body of the quorum needed to govern.[1] Opponents of this supervisory authority warned

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[1] For example, James Wilson argued in Pennsylvania that it was "highly proper that the federal government should throw the exercise of this power [to regulate congressional elections] into the hands of the state legislatures; but not that it should be placed there entirely without control," because "[s]ome states might make no regulations at all on the subject," leaving the national government to "lie prostrate at the mercy of the legislatures of the several states." II Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 440-441 (2d ed. 1888); see also III Elliot, *supra*, at 367 (James Madison) ("It was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution"); II Elliot, *supra*, at 326 (John Jay) ("Suppose that, by design or accident, the states should *neglect to appoint representatives*; certainly there should be some constitutional remedy for this evil. The obvious meaning of the paragraph was, that, if this neglect should take place, Congress should have power, by law, to support the government, and prevent the dissolution of the Union"); *ibid.* (Robert Morris) ("[I]t was absolutely necessary that the existence of the general government should not depend, for a moment, on the

that the members of Congress, who already possessed extraordinary power under the Constitution, should not also be given the ability to *retain* power by manipulating the electoral process, especially the location of polling places.[2]

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will of the state legislatures. The power of perpetuating the government ought to belong to their federal representatives; otherwise, the right of the people would be essentially abridged"); see generally III Joseph Story, *Commentaries on the Constitution of the United States* § 410 (1833).

[2] "[B]y this power to regulate elections," argued a Colonel Jones in Massachusetts, "Congress might keep themselves in to all duration." II Elliot, *supra*, at 28; see also III Elliot, *supra*, at 60 (Patrick Henry) ("The control given to Congress over the time, place, and manner of holding elections, will totally destroy the end of suffrage. The elections may be held at one place, and the most inconvenient in the state; or they may be at remote distances from those who have a right of suffrage: hence nine out of ten must either not vote at all, or vote for strangers"); II Elliot, *supra*, at 30 (Mr. Turner) ("[T]hey may order that it may be at the extremity of a state, and, by their influence, may there prevail that persons may be chosen, who otherwise would not; by reason that a part of the qualified voters, in part of the state, would be so incommoded thereby, as to be debarred from their right as much as if they were bound at home"); 2 Herbert J. Storing, *The Complete Anti-Federalist* 386 (1981) (Brutus) ("The proposed Congress may make the whole state one district, and direct, that the capital (the city of New-York, for instance) shall be the place for holding the election; the consequence would be, that none but men of the most elevated rank in society would attend, and they would as certainly choose men of their class"); 4 Storing, *supra*, at 42-43 (*Vox Populi*) ("What, then, would be the case if Congress should think proper to direct, that the elections should be held at the north-west, south-west or north-east part of the state, the last day of March? How many electors would there attend the business?"); *id.* at 142-143 (Cornelius) ("This power being vested in the Congress, may enable them, from time to time, to throw the elections into such particular parts of the several States where the dispositions of the people shall appear to be the most subservient to the wishes and views of that

In Federalist No. 59, Alexander Hamilton summarized the reasons both for granting Congress a supervisory authority over congressional elections and for limiting the exercise of such authority. According to Hamilton, the necessity of the supervisory authority "rests upon the evidence of this plain proposition, that every government ought to contain in itself the means of its own preservation." *The Federalist Papers* 299 (Garry Wills ed. 1982). To ensure Congress's preservation, the power to regulate the election of members could not be lodged exclusively in state legislatures: "[E]very period of making [elections] would be a delicate crisis in the national situation; which might issue in a dissolution of the Union, if the leaders of a few of the most important States should have entered into a previous conspiracy to prevent an election." *Id.* at 302.

At the same time, however, Hamilton acknowledged the concern that Congress, no less than the state legislatures, might abuse its power to regulate elections. Thus, Hamilton assured his audience that federal intervention would be the exception, not the rule. The Constitution "submitted the regulation of elections for the Federal Government in the first instance to the local administrations; which in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but [it has] reserved to the national authority a right to interpose, *whenever extraordinary circumstances might render that interposition necessary to its safety.*" *Id.* at 300 (emphasis added).

As this history makes clear, the Framers fully expected that legislative districting decisions would be heavily influenced by political agendas. Recognizing that this problem was fundamentally one of *politics*, however, the Framers crafted a *political* solution: assigning the power to regulate elections to the States, subject to an ultimate

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honourable body; or, where the interests of the major part of the members may be found to lie"); see generally III Story, *supra*, § 409.

supervisory authority in Congress. As the Framers envisioned it, the supervisory power of Congress—which, as noted above, was quite robust—would be invoked in only the most unusual circumstances, where the very survival of the national government depended upon its exercise.

B. Congress's historical willingness to exercise its supervisory authority significantly reduces the need for judicial intervention under the Constitution.

Not surprisingly, Congress has made much more of its supervisory power than the Framers anticipated. Although Congress did not enact apportionment legislation until 1842, it has repeatedly exercised its supervisory authority since then. And the statutes it has enacted reflect changing views of the legal requisites for fair political representation.

"Until 1842 there was the greatest diversity among the States in the manner of choosing Representatives because Congress had made no requirement for districting." *Colegrove*, 328 U.S. at 555. Congress responded to this lack of uniformity by passing the Apportionment Act of 1842, which provided both that "the House of Representatives shall be composed of members elected agreeably to a ratio of one Representative for every [7680] persons in each State," and that the members "shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which [the] States may be entitled, no one district electing more than one Representative." 5 Stat. 491, 491. Congress again imposed these requirements in 1862. 12 Stat. 572, 572.

Ten years later, but long before the advent of this Court's "one person, one vote" doctrine, see *Wesberry*, 376 U.S. at 7-8, 18, Congress added another requirement for congressional districting—that the districts "contain[] as nearly as practicable an equal number of inhabitants." 17 Stat. 28, 28. Apportionment statutes passed in 1882 (22 Stat. 5) and 1891 (26 Stat. 735) repeated the requirement that Representatives

be elected from single-member districts composed of contiguous territory and nearly equal populations.

In 1901, Congress added yet another requirement for congressional districting, this time mandating that districts be "compact." 31 Stat. 733, 734. The 1911 apportionment statute included the same requirement. See 37 Stat. 13, 14. Thus, in the nearly seventy years from 1842 to 1911, Congress exercised its supervisory authority under Article I, § 4 to mandate the election of Representatives by (1) single-member districts that were (2) equipopulous, (3) composed of contiguous territory, and (4) compact.

Not all of these requirements, however, were understood to be inviolable principles of fair representation, for in 1929 Congress enacted an apportionment statute that "did not carry forward those requirements as previous apportionment acts had done." *Wood* v. *Broom*, 287 U.S. 1, 6 (1932). Although the original bill included all of the elements of the prior statutes, "the House of Representatives, after debate, struck out these provisions." *Id.* at 7. Some Representatives later attempted to insert the deleted provisions back into the bill, but that attempt was defeated. *Ibid.* Given this history, the Court in *Wood* concluded that "[i]t was manifestly the intention of the Congress not to re-enact the provision as to the compactness, contiguity, and equality in population with respect to the districts to be created pursuant to the reapportionment under the Act of 1929." *Ibid.* As the second Justice Harlan later noted, "[t]he likely explanation for the omission is suggested by a remark on the floor of the House that 'the States ought to have their own way of making up their apportionment when they know the number of Congressmen they are going to have.'" *Wesberry*, 376 U.S. at 44 (dissenting opinion).

Although Congress again amended its apportionment statute in 1940 (54 Stat. 162) and 1941 (55 Stat. 761), it did not revive the former requirements of single-member districts,

equal population, contiguity, or compactness. In 1967, however, Congress required that Representatives be elected from single-member districts. 81 Stat. 581, 581. This provision remains in effect today. See 2 U.S.C. § 2c.

This history of congressional action confirms beyond any doubt that Congress's supervisory authority under Article I, § 4 is a powerful tool to oversee and check the States' regulation of congressional elections. This history also shows that Congress has been willing to ratchet up (or down) its level of oversight, depending upon the perceived necessities of the time. Although Congress has invoked Article I, § 4 more often than the Framers anticipated, the process of give and take over election rules is just what they expected.

C. This Court historically has declined to invoke the Constitution as a basis for intervening in redistricting, leaving such matters to legislatures, which have greater institutional competence in this area.

This Court has long acknowledged the fact—so plainly appreciated by the Framers—that legislative districting is a thoroughly *political* enterprise. Indeed, "[t]he one stark fact that emerges from a study of the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and party interests." *Colegrove*, 328 U.S. at 554. As Justice O'Connor has noted: "The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level. Thus, the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out—by the very parties that are responsible for this process—present a political question in the truest sense of the term." *Davis* v. *Bandemer*, 478 U.S. 109, 145 (1986) (concurring opinion). In

short, "[l]egislative districting is highly political business." *Miller*, 515 U.S. at 934 (Ginsburg, J., dissenting).

Not only does judicial intervention in political gerrymandering cases "inject the courts into the most heated partisan issues," *Davis*, 478 U.S. at 145 (O'Connor, J., concurring), but it also contravenes the Constitution's separation of powers. Reapportionment "is primarily a matter for legislative consideration" (*White*, 412 U.S. at 794) that necessarily involves a "complex interplay of forces" that must be identified, weighed, and mediated or compromised (*Miller*, 515 U.S. at 915-916). In terms of both institutional competence and political accountability, legislatures are better positioned than courts to assume responsibility for redistricting. As the Court explained in *Connor*, "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." 431 U.S. at 414-415. Similarly, Justice Ginsburg has observed that "[d]istrict lines are drawn to accommodate a myriad of factors—geographic, economic, historical, and political—and state legislatures, as arenas of compromise and electoral accountability, are best positioned to mediate competing claims." *Miller*, 515 U.S. at 936 (dissenting opinion).

By contrast, the federal courts "possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Connor*, 431 U.S. at 415. In the exercise of judicial authority, courts define rules and standards that must govern all similar cases; *ad hoc* compromise, by contrast, is the hallmark of legislative process. Whereas "[l]aws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc"—reflecting political compromise—"law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 278 (plurality opinion).

This Court's inability to reach consensus on the appropriate standard for review of partisan gerrymandering cases confirms the political nature of the enterprise. See *id.* at 306-307 (Kennedy, J., concurring) (noting the "lack of comprehensive and neutral principles for drawing electoral boundaries"); *id.* at 318 (Stevens, J., dissenting) ("[W]e have not reached agreement on the standard that should govern partisan gerrymandering claims"). Indeed, the court below lamented "the difficulty * * * of divining rules or standards adequate to distinguish a judicial decision resolving issues of partisanship in redistricting from a legislative act," suggesting that lower courts were resigned to "the indefensible position of undertaking a task they cannot perform." App. 8a-9a. As one commentator has noted, "[i]n the case of partisan gerrymandering, it is virtually impossible to devise judicially manageable standards that distinguish between legitimate and illegitimate districting schemes," and "it would be absurd to hold that politicians cannot take politics into account in making the most political of all decisions." Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv. J.L. Pub. Pol. 103, 113-114 (2000). Recognizing the political nature of the enterprise, the Framers delegated the regulation of congressional elections to two different *legislatures*.

Given the clear textual commitment to the States and Congress of regulations concerning congressional elections; the historical evidence demonstrating that the Framers fully appreciated the political nature of the problem and settled on a political solution; Congress's willingness to exercise its supervisory powers; the Court's recognition that legislatures are better positioned than courts to bear responsibility for reapportionment and redistricting; and the separation of powers difficulties that attend judicial supervision in this area, the Court should not now accept appellants' invitation to inject itself into a quintessentially *political* dispute. Federal courts should not undertake "substantial intrusion into the

Nation's political life" without a clear constitutional mandate. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). There is no such mandate here.[3]

II. The Fact That A Political Party Benefited From A Redistricting Decision Does Not Give Rise To Even A Presumption Of Unconstitutionality.

Contrary to the appellants' view, the fact that a redistricting plan benefits one party at the expense of another does not render it suspect, let alone unconstitutional. The Framers well understood that redistricting would *inevitably* favor one political group over others, and that is no less true today. Moreover, striking down a redistricting plan on the basis of "excessive partisan advantage" would be especially inappropriate where, as here, the effect of the plan is to bring congressional representation closer in line with statewide voting patterns. Indeed, inasmuch as *Vieth* upheld a plan that *weakened* the relationship between state-wide voting patterns and the parties' congressional seats, it is easily valid for Texas to adopt a plan that *strengthens* that relationship and thus "dismantle[s] a prior partisan gerrymander that had entrenched a minority party." App. 25a. Recognizing appellants' partisan gerrymandering claims here would invite significant intrusion by federal courts into the States' handling of ordinary political disputes.

1. As shown above, the Framers well understood the risk that elected officials would manipulate electoral processes for

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[3] We agree with the plurality in *Vieth* that political gerrymandering claims should be nonjusticiable, but the Court need not revisit that issue to resolve this case. Moreover, we readily acknowledge that the Fourteenth and Fifteenth Amendments, as well as the Voting Rights Act, justify a far broader role for federal courts in resolving claims of racial gerrymandering. See *Shaw*, 509 U.S. at 657; *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring); *Davis*, 478 U.S. at 160-161 (O'Connor, J., concurring).

their own benefit. As early as 1702, "[t]he practice of refusing to establish additional election districts when convenience and justice required was followed by the governors whenever they feared the new members would not support their policy." Elmer C. Griffith, *The Rise and Development of the Gerrymander* 26 (reprint ed. 1974). By the time the Framers convened in Philadelphia, examples of political gerrymandering had already been seen in New York, Pennsylvania, and North Carolina. See *id.* at 26-29, 120-121. In light of this recent experience, James Madison predicted that state legislatures, in regulating congressional elections, would "mould their regulations as to favor the candidates they wished to succeed." 2 Farrand, *supra*, at 241. Likewise, Charles Cotesworth Pinckney ultimately approved of Congress's oversight powers "lest, by the intrigues of a ruling faction in a state, the members of the House of Representatives should not really represent the people of the state." IV Elliot, *supra*, at 303.

2. Regulating congressional elections is no less a political business today. See *Miller*, 515 U.S. at 934 (Ginsburg, J., dissenting); *Davis*, 478 U.S. at 145 (O'Connor, J., concurring). As this Court has recognized: "The reality is that districting *inevitably* has and is intended to have substantial political consequences." *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973) (emphasis added).

It would be particularly inappropriate to invalidate for "excessive partisanship" a redistricting plan that reflects statewide voting patterns more accurately than the previous plan. As the Court explained in *Gaffney*, "reflect[ing] the relative strength of the parties in locating and defining election districts" is a wholly legitimate goal in redistricting, and "neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to

recognize it and, through districting, provide a rough sort of proportional representation." *Id.* at 752, 754.

That is precisely what the Texas legislature accomplished in its 2003 redistricting plan. As the court below found (App. 10a-12a), Texas's congressional representation did not fairly reflect the State's voting patterns, as the minority party in statewide voting held a decided advantage in the State's congressional elections. The 2003 redistricting plan remedied that situation: in 2004, the majority party in statewide voting also won a majority of congressional seats. *Id.* at 13a.

The 2003 plan was anything but anomalous. Of the 35 state redistricting plans implemented without judicial intervention after the 2000 census, 28—including Texas—produced congressional delegations in which the majority party matched the State's preference in the 2000 presidential election. See Appendix. The plans in 21 States—including Texas—produced congressional delegations in which the majority party reflected the State's preference in the most recent gubernatorial election. *Ibid.* Had the Texas legislature *not* implemented a new redistricting plan in 2003, Texas would have been one of only three States (Arkansas and Tennessee are the others) in which the majority party in the congressional delegation was not the party preferred by the State's voters in the preceding presidential *or* gubernatorial election. *Ibid.*

The fact that the 2003 redistricting plan produced this result hardly condemns the plan, as appellants contend. To the contrary, this fact commends the plan, because it shows that the plan achieved a legitimate goal for redistricting—an accurate reflection of voters' political preferences. See *Gaffney*, 412 U.S. at 753 (stating that "[t]he very essence of districting" is to produce a result that is more "politically fair" than would otherwise occur). For the first time in 14 years, the party with the majority of the statewide vote also held a majority of the congressional seats. And as this Court

has recognized, "judicial interest should be *at its lowest ebb* when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so." *Id.* at 754 (emphasis added).

Given the inevitability that elected officials charged with drawing congressional districts will seek to maximize their political interests, it can only be considered a success when, as here, the redistricting plan they produce reasonably reflects the statewide voting patterns of their constituents. In short, appellants' contention that partisan motives invalidate the 2003 redistricting plan cannot be reconciled with this Court's decisions, or with common sense.

3. This Court's decision in *Vieth* confirms that attempting to bring a congressional delegation into line with the parties' apparent statewide strength is a lawful legislative purpose. The Court there rejected a partisan gerrymandering challenge to a Pennsylvania redistricting plan that, according to the facts on which the Court relied, was adopted "as a punitive measure against Democrats for having enacted pro-Democrat redistricting plans *elsewhere*." 541 U.S. at 272 (emphasis added). Prior to adoption of that plan, Republican candidates captured 48 percent of the statewide vote versus 47 percent for Democratic candidates, and Republicans won 11 seats for Congress (52%), versus 10 for Democrats (48%). Thus, there was a close correspondence between the statewide numbers and congressional representation. App. 25a. After adoption of the plan, however, Republicans captured 12 of 19 congressional seats (63%) despite garnering only 46 percent of the statewide vote, versus 51 percent for Democrats. The new redistricting plan thus *increased* the disparity between the parties' representation in the congressional delegation and their apparent statewide strength.

If it was valid for Pennsylvania to adopt a redistricting plan that gave Republicans 63 percent of its congressional seats while gaining only 46 percent of the statewide vote—thus *weakening* the link between the parties' statewide numbers and their congressional representation—then surely Texas may adopt a plan under which Republicans gain 66 percent of the State's congressional seats while gaining 58 percent of the statewide vote. Indeed, whereas the plan in *Vieth* was allegedly adopted as payback for Democratic gerrymandering in *other* States, the plan here was adopted to "dismantle a prior partisan gerrymander that had entrenched a minority party" *in Texas* and to "bring [the] congressional delegation more in line with the parties' apparent statewide strength." App. 25a. In sum, affirmance here should follow *a fortiori* from this Court's decision in *Vieth*.

4. Recognizing appellants' partisan gerrymandering claims would also result in frequent and "unprecedented [judicial] intervention in the American political process." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). The necessity of redistricting, combined with the certainty that States will gain and lose seats in Congress as the result of each decennial census, ensures that there will be more opportunities for political gerrymandering. Recent experience also makes clear that the "losers" under any redistricting plan will demand a judicial, rather than a political, remedy.

That prospect is highlighted by the aftermath of the 2000 census, as a result of which eighteen States gained or lost congressional seats. See Congressional Quarterly, *CQ's Politics in America 2002*, at xxiv (2001). Thus, redistricting in those States necessarily affected the makeup of congressional delegations. In eight such States, one party dominated the legislature and thus controlled redistricting. See Appendix. And in each of those States the party in charge of redistricting produced a plan that was favorable to its own members. *Ibid.*

For example, Florida and Texas gained additional seats as a result of the 2000 census, and Republican legislatures in those States enacted redistricting plans that resulted in Republican gains in the congressional delegation. *Ibid.* California, Georgia, and North Carolina also gained additional seats in Congress, and in those States Democratic legislatures enacted redistricting plans that resulted in Democratic gains. *Ibid.* As the Court is aware, Pennsylvania lost two seats after the 2000 census, and its Republican legislature enacted a plan that resulted in the Democrats' losing three congressional seats. *Ibid.* This pattern of redistricting in the States that gained or lost congressional seats after the 2000 census can be expected to recur after each census.

Of course, the simple fact that a redistricting plan results in favorable treatment for the party controlling redistricting cannot itself establish a constitutional claim. If it did, the party out of power in the state legislature would inevitably go to court, arguing that the plan's results were evidence of improper motives or animus. Courts would find themselves ever more entangled in the "political thicket." *Colegrove*, 328 U.S. at 556. Now, almost twenty years after *Davis* v. *Bandemer*, there still is no settled standard by which to evaluate political gerrymandering claims. See 541 U.S. at 279-281; *id.* at 307-308 (Kennedy, J., concurring); *id.* at 318 (Stevens, J., dissenting). Thus, just as the Court "refrain[ed] from directing [a] substantial intrusion into [Pennsylvania's] political life" in *Vieth*, so too should the Court refrain from doing so in Texas or any other State. *Id.* at 306 (Kennedy, J., concurring).

III. The Constitution Permits The States To Redraw Congressional Districts Mid-Decade Based On The Most Recent Decennial Census Data.

The fact that a districting plan is redrawn in mid-decade also provides no basis for constitutional scrutiny. Indeed,

appellants' argument that the "one person, one vote" principle requires use of updated population data would effectively prohibit all mid-decade redistricting and require federal courts to impose their own redistricting plans immediately upon finding constitutional flaws in state plans.

1. Under appellants' theory, a redistricting plan enacted just *three years* after the decennial census on which it is based—and just two years after the earliest conceivable date on which the state legislature might have acted—violates the "one person, one vote" principle because it cannot adequately reflect the population that existed at the time of that census. But this argument assumes, contrary to this Court's decisions and common sense, that the decennial census provides a precisely accurate description of relevant populations at the start of a decade and that population shifts occur steadily and in just one direction over the course of that decade.

In fact, the decennial census does not provide a precise measure of the gross population in a State, much less the voting population. "The United States census is more of an event than a process. It measures population at only a single instant in time." *Gaffney*, 412 U.S. at 746. Moreover, as the Court noted in *Karcher* v. *Daggett*, 462 U.S. 725 (1983), the census "may systematically undercount population, and the rate of undercounting may vary from place to place." *Id.* at 738. In short, "the census data are not perfect." *Id.* at 732.

Even a precisely accurate census would not provide perfect information for districting purposes, "because 'census persons' are not voters." *Gaffney*, 412 U.S. at 746. As Justice White observed in *Karcher*, "a substantial percentage of the total population is too young to register or is disqualified by alienage," and "census figures cannot account for the proportion of all those otherwise eligible individuals who fail to register." 462 U.S. at 771-772 (dissenting opinion). See

McConnell, *supra*, at 110-111 (explaining differences between population and "voting-eligible population").

Moreover, population shifts are hardly as predictable as appellants suggest. "District populations are constantly changing, often at different rates in either direction, up or down. Substantial differentials in population growth rates are striking and well-known phenomena." *Gaffney*, 412 U.S. at 746. On account of the "well-known restlessness of the American people," decennial census data for particular districts "are outdated long before they are completed." *Karcher*, 462 U.S. at 732. Given these ever-occurring population shifts, it is inevitable that "districts will be malapportioned—in percentages far exceeding those in *Karcher*—most of the time. Voters in districts of declining population will be overrepresented relative to voters in districts of increasing population." McConnell, *supra*, at 110.

Despite these inherent—and obviously consequential—limitations, the Court has described the decennial census as the "best population data available," *Karcher*, 462 U.S. at 738, and it remains the standard by which the States and federal courts measure compliance with the "one person, one vote" principle. Indeed, the Court has admonished the States that, whatever its structural flaws, the decennial census "is the only basis for good-faith attempts to achieve population equality." *Ibid.* The Court's commitment to the decennial census as the benchmark for compliance with the "one person, one vote" rule is further demonstrated by its approval of the "legal fiction" that redistricting plans based on such data satisfy the principle throughout the decade preceding the next census, even though more current data might prove the opposite. *Georgia* v. *Ashcroft*, 539 U.S. 461, 488 n.2 (2003).

Appellants suggest that a State should not benefit from this presumption when it engages in mid-decade redistricting. But this argument has no limiting principle. A

"mid-decade" redistricting is any redistricting that occurs after the initial attempt. Whether it occurs two or eight years after the census, appellants would complain that the new plan violates the "one person, one vote" rule because the relevant populations have changed over time.

Appellants' argument also runs headlong into this Court's decision in *Reynolds* v. *Sims*, 377 U.S. 533 (1964). There, this Court specifically contemplated that States might reapportion their legislatures more often than every ten years. *Id.* at 583-684. Although "[d]ecennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth," it is by no means the *only* approach that the Constitution permits. *Id.* at 583.

Such an approach would also conflict with this Court's own instructions to federal courts in redistricting cases. For example, the Court in *Wise* v. *Lipscomb*, 437 U.S. 535 (1978), noted that when federal courts intervene in redistricting, their mandate continues "pending later legislative action." *Id.* at 540. Thus, if a federal court invalidates an existing state plan, the remedy is not to impose a valid plan immediately but to "afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure." *Ibid.* Such a substitute measure would continue in effect until "it, too, is challenged and found to violate the Constitution." *Ibid.* Thus, several years may pass between a census and the ultimate implementation of a constitutional redistricting plan, but that fact does not undermine the plan's validity.

2. The logical implication of appellants' theory is that a federal court finding a constitutional infirmity in a State's proposed redistricting plan must impose a valid plan immediately, so that the voting rights of citizens in the affected congressional districts will not further be infringed. Such a result is contrary to this Court's clear instructions that

redistricting and reapportionment are "legislative task[s]" committed primarily to the States (*Wise*, 437 U.S. at 539; *White*, 412 U.S. at 794-795); and that federal courts may not simply substitute their judgments about fair representation for those of state legislatures (*Upham* v. *Seamon*, 456 U.S. 37, 40-41 (1982) (*per curiam*); *White*, 412 U.S. at 795).

Indeed, given Article I's clear commitment of redistricting decisions to the States, the rule is settled that "[w]hen a federal court declares an existing apportionment scheme unconstitutional," it should "afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise*, 437 U.S. at 540. Appellants' argument is wholly inconsistent with this rule, and with a constitutional scheme in which state legislatures, rather than federal courts, are the primary arbiters of redistricting.

3. Of course, the fact that the federal courts may not prohibit mid-decade congressional redistricting does not mean that Congress or the States may not do so. The validity of mid-decade congressional redistricting is a fundamentally political issue on which legislatures may differ, and to date Congress and most States have not felt it necessary to ban it. But Article I, § 4 provides sufficient authority for Congress to do so, and a handful of States have already taken action in this regard. For example, the statutes or constitutions of at least six States expressly prohibit mid-decade congressional redistricting;[4] the highest courts in California and Colorado have each held that their state constitutions bar serial

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[4] See Ariz. Const. art. IV, pt. 2, § 1; Conn. Const. art. III, § 6; Mont. Const. art. V, § 14; N. J. Const. art. II, § II, ¶ 8; Tenn. Code Ann. § 2-16-102; Wash. Rev. Code § 44.05.030.

redistricting;[5] and at least sixteen States prohibit mid-decade alteration of *state* legislative districts.[6] Other States expressly authorize their legislatures to redistrict at any time.[7]

In short, activity at the state level confirms two things: first, the validity of mid-decade redistricting is an issue on which States reasonably disagree; and second, federal court intervention is unnecessary because elected officials are fully able to enact a prohibition on mid-decade redistricting if, in their considered judgment, it is necessary to do so.

* * * * *

We again emphasize that the position we advocate is one of principle, not politics. Republicans benefited from the 2003 Texas redistricting plan; Democrats benefited from the 1991 Texas redistricting plan; and time alone will tell which party will benefit from future plans. The neutral principle of deference to state legislatures, however, can and should be applied regardless of which party happens to hold power in any particular legislature at any particular time.

CONCLUSION

The decision below should be affirmed.

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[5] See *Legislature* v. *Deukmejian*, 669 P.2d 17, 24-25 (Cal. 1983) (*en banc*); *People ex rel. Salazar* v. *Davidson*, 79 P.3d 1221, 1237-1240 (Colo. 2003).

[6] See Ala. Const. art. IX, §§ 198, 200; Conn. Const. art. III, § 6; Del. Code Ann. tit. 29, § 805; Haw. Const. art. IV, §§ 1, 2; Mass. Const. amend. art. CI, § 2; Mont. Const. art. V, § 14; N.M. Const. art. IV, § 3; N.C. Const. art. II, §§ 3, 5; Ohio Const. art. XI, §§ 1, 6; Pa. Const. art. II, § 17; Tenn. Code Ann. §§ 3-1-102, -103; Wash. Rev. Code § 44.05.030.

[7] *E.g.*, S.C. Const. art. VII, § 13 ("The General Assembly may at any time arrange the various Counties into Judicial Circuits, and into Congressional Districts *** as it may deem wise and proper"); Wyo. Const. art 3, § 49 ("Congressional districts may be altered from time to time as public convenience may require").

Respectfully submitted.

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CONGRESSIONAL REDISTRICTING IN THE STATES FOLLOWING THE 2000 CENSUS

State	Year	Party in Control of Redistricting	Congressional Seats Before Redistricting	Congressional Seats After Redistricting	Previous Vote for President	Previous Vote for Governor
AL	2002	D	5R / 2D	5R / 2D	R (56-42)	D (58-42)
AK						
AZ	2001	Commission	5R / 1D	6R / 2D	R (51-45)	R (61-36)
AR	2001	D	3D / 1R	3D / 1R	R (51-46)	R (60-40)
CA	**2001**	**D**	**32D / 20R**	**33D / 20R**	**D (53-42)**	**D (58-38)**
CO	2002	Court-imposed	4R / 2D	5R / 2D	R (51-42)	R (49-48)
CT	2001	Commission	3R / 3D	3R / 2D	D (56-38)	R (56-44)
DE						
FL	**2002**	**R**	**15R / 8D**	**18R / 7D**	**R (49-49)**	**R (55-45)**
GA	**2001**	**D**	**8R / 3D**	**8R / 5D**	**R (55-43)**	**D (52-44)**
HI	2002	D	2D	2D	D (56-37)	D (50-49)
ID	2001	Commission	2R	2R	R (67-28)	R (68-29)
IL	2001	Split	10R / 10D	10R / 9D	D (55-43)	R (51-47)
IN	2001	Commission	6R / 4D	6R / 3D	R (57-41)	D (57-42)
IA	2001	Legislative Services Bureau	4R / 1D	4R / 1D	R (50-49)	D (52-47)
KS	2002	R	3R / 1D	3R / 1D	R (58-37)	R (73-23)
KY	2002	Split	5R / 1D	5R / 1D	R (57-41)	D (61-22)
LA	**2002**	**D**	**5R / 2D**	**4R / 3D**	**R (53-45)**	**R (62-30)**
ME	2003	Court-imposed	2D	2D	D (49-44)	D (47-41)
MD	**2002**	**D**	**4D / 4R**	**6D / 2R**	**D (57-40)**	**D (55-45)**
MA	2002	D	10D	10D	D (60-33)	R (51-47)
MI	**2001**	**R**	**9D / 7R**	**9R / 6D**	**D (51-46)**	**R (62-38)**
MN	2002	Court-imposed	5D / 3R	4D / 4R	D (48-46)	I (37-34)
MS	2002	Court-imposed	3D / 2R	2D / 2R	R (58-41)	D (50-49)
MO	2001	Split	5R / 4D	5R / 4D	R (50-47)	D (49-48)
MT						
NE	2002	R	3R	3R	R (62-33)	R (54-46)
NV	2001	Split	1R / 1D	2R / 1D	R (50-46)	R (52-42)
NH	2002	R	2R	2R	R (48-47)	D (49-44)
NJ	2002	Commission	7D / 6R	7D / 6R	D (56-40)	D (56-42)
NM	2002	Court-imposed	2R / 1D	2R / 1D	D (48-48)	R (55-45)
NY	2002	Split	19D / 12R	19D / 10R	D (60-35)	R (54-33)
NC	**2001**	**D**	**7R / 5D**	**7R / 6D**	**R (56-43)**	**D (52-46)**
ND						
OH	**2002**	**R**	**11R / 8D**	**12R / 6D**	**R (50-46)**	**R (50-45)**
OK	2002	Court-imposed	5R / 1D	4R / 1D	R (60-38)	R (58-41)
OR	2001	Court-imposed	4D / 1R	4D / 1R	D (47-47)	D (64-30)
PA	**2002**	**R**	**11R / 10D**	**12R / 7D**	**D (51-46)**	**R (57-31)**
RI	2002	D	2D	2D	D (61-32)	R (51-42)
SC	2002	Court-imposed	4R / 2D	4R / 2D	R (57-41)	D (53-45)
SD						
TN	**2002**	**D**	**5R / 4D**	**5D / 4R**	**R (51-47)**	**R (69-29)**
TX	**2003**	**R**	**17D / 15R**	**21R / 11D**	**R (59-38)**	**R (58-40)**
UT	2001	R	2R / 1D	2R / 1D	R (67-26)	R (56-42)
VT						
VA	**2001**	**R**	**7R / 3D / 1I**	**8R / 3D**	**R (52-44)**	**R (56-43)**
WA	2002	Commission	6D / 3R	6D / 3R	D (50-45)	D (58-40)
WV	2001	D	2D / 1R	2D / 1R	R (52-46)	D (50-47)
WI	2002	Split	5D / 4R	4D / 4R	D (48-48)	R (60-39)
WY						

1. Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming elect their Representatives at-large and thus do not draw congressional districts.

2. The highlighted rows show States in which the most recent redistricting plan resulted in gains for the party in control of redistricting.

3. The data contained in this table appear in Michael Barone & Richard E. Cohen, *Almanac of American Politics 2004* (2003); Michael Barone & Richard E. Cohen, *Almanac of American Politics 2002* (2001); and Congressional Quarterly, *CQ's Politics in America 2002* (2001).

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In The Supreme Court of the United States

EDDIE JACKSON, *et al.*,

Appellants,

v.

RICK PERRY, Governor of Texas, *et al.*,

Appellees.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,

Appellants,

v.

RICK PERRY, Governor of Texas, *et al.*,

Appellees.

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, Governor of Texas, *et al.*,

Appellees.

GI FORUM OF TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, Governor of Texas, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF OF *AMICUS CURIAE* RON WILSON IN SUPPORT OF APPELLEES

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Growe v. Emison, 507 U.S. 25 (1993) 7

Johnson v. DeGrandy, 512 U.S. 997 (1994) 10

Miller v. Johnson, 515 U.S. 900 (1995) 11

Reynolds v. Sims, 377 U.S. 533 (1964) 9, 10

Session v. Perry, 298 F. Supp. 2d 480 (E.D. Tex. 2004) 11, 13, 16, 17

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Voting Rights Act of 1965 8

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OTHER AUTHORITIES

Alexandar Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (2000) 8

Associated Press, *Maverick Democrat Part of GOP Team Negotiating Redistricting*, Tyler Morning Telegraph, September 29, 2003 5

Chilton Williamson, *American Suffrage: From Property to Democracy, 1760-1860* (1960) 8

Clay Robinson, *Wilson Resigns Seat With Five Months Left; House Democrat With A 27-year Run Was Defeated In March's Primary*, The Houston Chronicle, August 5, 2004 ..... 1, 2, 5

For Wilson: Democratic Incumbent In Texas House District 131, The Houston Chronicle, January 31, 2002 3

Grant M. Hayden, *Law and Democracy: A Symposium on the Law Governing Our Democratic Process: Refocusing on Race*, 73 Geo. Wash. L. Rev. 1254, 1261 (2005) 8, 9

Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 Calif.L.Rev. 1589, 1594 (2004) 9, 10, 11, 12, 13

Higher Education Agencies and Institutions Present 2004-2005 Budget Building Blocks to House Appropriations Subcommittee on Education, http://www.ktcinet.com/aaup/Wanda/feb_28_2003.htm. 3

Janet Elliott, *Wilson Proposes Voucher Program; Bill Aims To Help Poor Schoolkids*, The Houston Chronicle, December 18, 2002 3

TABLE OF AUTHORITIES – Continued

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John Moritz, *House-Senate Panel To Seek Compromise*, Fort Worth Star Telegram, September 26, 2003 4

John Moritz, *Legislator: Remap Targeted Frost*, Fort Worth Star Telegram 4

Ken Herman, *Wilson Pays A Price For Siding With GOP*, Austin American Statesman, March 11, 2004 ..... 1, 2

Marchette Chute, *The First Liberty: A History of the Right to Vote in America*, 1619-1850 (1969) 8

Paula Burka, Patricia Kilday Hart, John Spring, & Tania Krebs, *The Best & Worst Legislators 1997*, Texas Monthly Magazine, July 1997 1

Richard L. Engstron, *Voting Rights Districts: Debunking the Myths, Campaigns & Elections*, Apr. 1995 12

Ron Nissimov, *Ron Wilson: A Man of Contradictions, Controversy*, The Houston Chronicle, January 11, 2004 3

Scott S. Greenberger, *Wilson Happy To Be Austin's Antagonist: Houston Legislator Derides Idea That Developer Is Behind His Bills*, Austin American Statesman, March 14, 1999 1

Texans Seek to End Use of Racial Quotas and Racial Preferences: Ward Connerly Lends His Support to Texas Battle, http://www.adversity.net/texas/initiative.htm (last visited on January 19, 2005) 3

TABLE OF AUTHORITIES – Continued

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Texas House of Representatives District 131; Democrats; Ron Wilson, The Houston Chronicle, March 1, 1998 1

William McKenzie, *New Alliances In House Turning Heads*, The Dallas Morning News, February 11, 2003 2

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Ron Wilson is an African-American Democrat who served the state of Texas for 27 years as a member of the Texas House of Representatives and, as is shown below, has a unique perspective on this appeal that may assist this Court. *See* Clay Robinson, *Wilson Resigns Seat With Five Months Left; House Democrat With A 27-year Run Was Defeated In March's Primary*, The Houston Chronicle, August 5, 2004, at B1. In 1997, Mr. Wilson was named as one of the state's top ten legislators by Texas Monthly Magazine, which described him as a "revolutionary." *See* Paula Burka, Patricia Kilday Hart, John Spring, & Tania Krebs, *The Best & Worst Legislators 1997*, Texas Monthly Magazine, July 1997, at 96.

Representative Wilson owes no allegiance to Tom Delay. Rather, he has been an active, outspoken Democrat his entire life. Wilson was first introduced to state politics in 1973, while a student at the University of Texas in Austin, where he was an aid to African-American Democratic State Representative Mickey Leland of Houston, Texas. *See Texas House of Representatives District 131; Democrats; Ron Wilson*, The Houston Chronicle, March 1, 1998, at Voter's Guide, pg. 7; *see also* Ken Herman, *Wilson Pays A Price For Siding With GOP*, Austin American Statesman, March 11, 2004, at A1; *see also* Scott S. Greenberger, *Wilson Happy To Be Austin's Antagonist: Houston Legislator Derides Idea That Developer Is Behind His*

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[1] Pursuant to Rule 37.6 of this court, *amicus curiae* states that no party had any role in writing this brief and that no one other than *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties.

Bills, Austin American Statesman, March 14, 1999, at A1. Three years later, when he was only 23 years old, Wilson was elected to the Texas House of Representatives for the 131st District, in Houston, Texas. *See* Ken Herman, *Wilson Pays A Price For Siding With GOP*, Austin American Statesman, March 11, 2004, at A1. At the time he left his seat in the Texas House in 2004, Wilson ranked fifth in seniority among Texas' 150 House members. *See* Clay Robinson, *Wilson Resigns Seat With Five Months Left; House Democrat With A 27-year Run Was Defeated In March's Primary*, The Houston Chronicle, August 5, 2004, at B1.

During Representative Wilson's long career in the Texas House, he served on[2] and chaired a variety of committees and was responsible for numerous pieces of significant legislation. In fact, Wilson chaired the following committees: Public School Finance Select Committee on Tax (2001-2003); Ways and Means (2001-2003); Licensing and Administrative Procedures (1991-2001); Liquor Regulations (1985-1991); Rules, Select (1989-1991); Health Services (1979-1981); Junior College Funding, Select (1977-1979). *See* Committee Information for Ron Wilson, Slip File for Texas Congressman Ron Wilson at the Texas Legislative Reference Library. In addition, Texas Speaker of the House, Tom Craddick, appointed Wilson to be in charge of the Texas House tax-writing panel. *See* William

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[2] Representative Wilson served on these committees and others: Judicial Affairs, Public School Finance, Election, Teacher Health Insurance, Energy Resources, Revenue and Public Education Funding, Pensions and Investments, State Affairs, Department of Human Resources Audits, Human Services, Public Health, Calendars, Texas Department of Mental Health and Mental Retardation. *See* Committee Information for Ron Wilson, Slip File for Texas Congressman Ron Wilson at the Texas Legislative Reference Library.

McKenzie, *New Alliances In House Turning Heads*, The Dallas Morning News, February 11, 2003 at 15A.

Through these key leadership positions, Wilson fought to enact legislation that advanced minority interests. *See* Ron Nissimov, *Ron Wilson: A Man of Contradictions, Controversy*, The Houston Chronicle, January 11, 2004. For example, Wilson advocated the creation of an independent, civilian review of the police force to end racial profiling. *See For Wilson: Democratic Incumbent In Texas House District 131*, The Houston Chronicle, January 31, 2002, at A24. To improve education for African-Americans and minorities, Wilson supported legislation to provide private school vouchers to low-income students from six of the state's largest urban districts. *See* Janet Elliott, *Wilson Proposes Voucher Program; Bill Aims To Help Poor Schoolkids*, The Houston Chronicle, December 18, 2002, at A41.[3] In an effort to cure the dramatic decrease in minority enrollment at public universities, Wilson supported House Bill 484, which allowed the top ten percent of graduates from state-supported universities to receive automatic admission to public university graduate or professional schools. *See Higher Education Agencies and Institutions Present 2004-2005 Budget Building Blocks to House Appropriations Subcommittee on Education*, http://www.ktcinet.com/aaup/Wanda/feb_28_2003.htm. Additionally, to protect minority business interests, Wilson supported legislation to open to the public the contents of the files related to businesses in the state's racial and gender contracting quota program. *See Texans Seek to End Use of Racial Quotas and*

[3] Nationally, school vouchers enjoy support by a considerable majority of African-Americans, especially low-income African-Americans. *See, e.g.*, Straight Talk on Vouchers, Washington Post, at A18, May 12, 2003.

Racial Preferences: Ward Connerly Lends His Support to Texas Battle, http://www.adversity.net/texas/initiative.htm (last visited on January 19, 2005).

Furthermore, Representative Wilson's experience includes the subject of this appeal – congressional redistricting. Wilson was one of the ten legislators chosen to be a member of the Texas House-Senate panel on redistricting. *See* John Moritz, *House-Senate Panel To Seek Compromise*, Fort Worth Star Telegram, September 26, 2003, at 6B. After reviewing the evidence presented to the Committee on the plan at issue, Wilson supported the Republican-drawn redistricting map because he believed that it provided the best opportunity to add an additional African-American Congressman from Texas. *See* John Moritz, *Legislator: Remap Targeted Frost*, Fort Worth Star Telegram, at 1B. This belief was founded on Wilson's experience. Wilson's long experience also leads him to believe that minorities' voting rights are better served by the creation of "safe" minority-majority districts, which ultimately send more Black and Hispanic representatives to Congress. Wilson believes this result is desirable, even if it costs incumbent white Democrats their seats, because he believes African-Americans initiate bills on minority issues far more often than white Democrats with black constituents. He also believes that holding actual seats gives blacks the power of the incumbency and other similar benefits. *See id.* According to Wilson, minority influence districts (an alternative to minority-majority districts) are nothing more than "begging and pleading, step-and-fetch-it districts" which do little, if anything, to really promote minority interests. *See id.* Although Wilson lost his legislative seat after supporting this

Plan,[4] he still believes his support of the plan was the right decision because an African-American ultimately unseated a Caucasian incumbent, in the Democratic primary for the redrawn 9th Congressional District, giving the district an African-American representative. *See* Clay Robinson, *Wilson Resigns Seat With Five Months Left; House Democrat With A 27-year Run Was Defeated In March's Primary*, The Houston Chronicle, August 5, 2004, at B1.

Wilson's insight into the instant dispute is unique – not only is he one of the few Democrats who supported a Republican redistricting plan – he is also an experienced African-American legislator familiar with Texas' voting patterns and with the redistricting process who is licensed to practice law and to practice before this Court. According to the Republican Speaker of the Texas House, Tom Craddick, Wilson "probably knows more about redistricting than most of the people on the House floor." *See* Associated Press, *Maverick Democrat Part of GOP Team Negotiating Redistricting*, Tyler Morning Telegraph, September 29, 2003. Thus, former Congressman Wilson respectfully submits this *amicus curiae* brief for the Court's consideration.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the court below because the Texas Legislature properly exercised its authority to re-draw the Texas Congressional District map. Texas'

[4] The Texas Democratic Party, angered by his support for the Republican-backed congressional map, successfully worked to remove Wilson from his seat. *See, e.g.*, Clay Robinson, *Wilson Resigns Seat With Five Months Left; House Democrat With A 27-year Run Was Defeated In March's Primary*, The Houston Chronicle, August 5, 2004, at B1.

choice, to draw "safe" minority-majority districts to ensure that minorities are fairly represented in Congress, met the requirements of the Voting Rights Act and the Constitution and this Court should not interfere in the inherently legislative task of redrawing Congressional maps.

ARGUMENT

I. This Court Should Affirm the Decision Below Which Found that Plan 1374C Did Not Violate Section 2 of the VRA.

Even if the Jackson Plaintiffs could meet the preconditions[5] necessary to bring a claim under Section 2 of the Voting Rights Act ("VRA"), this Court should still affirm the decision below because, in passing Congressional Redistricting Plan 1374C, the Texas Legislature properly exercised its prerogative to create additional minority-majority districts to increase minority Congressional seat opportunities in proportion to the percentage of minority members in the Texas population.[6] Thus, this Court should

[5] The test developed in *Thornburg v. Gingles*, 478 U.S. 30 (1986) requires a plaintiff to meet a three-pronged test, in order to state a claim under Section 2 of the Voting Rights Act: "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a *majority* in a single-member district." 478 U.S. at 50 (emphasis added). "Second, the minority group must be able to show that it is politically cohesive." *Id.*, at 51. "Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate." *Id.*

[6] For example, Plan 1374C's three "safe" African-American districts comprise 9.4% (3/32) of the available districts which is comparable to the percentage of the black Texas voting-age population: 11.7%.